

**RECEIVED****AUG 10 1994**

August 10, 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, DC 20554

Re: Request for Reduction of Fee for COMSTAR D-2 Satellite

Dear Mr. Caton:

Enclosed for filing with the Federal Communications Commission is a Request of COMSAT General Corporation for a determination that the \$65,000 fee assessed by the Omnibus Budget Reconciliation Act of 1993 "per operational [domestic space] station in geosynchronous orbit"<sup>1</sup> "authorized to provide communications between satellites and earth stations on a common carrier and/or private carrier basis",<sup>2</sup> on the October 1, 1993 date for calculating fees, is not required for the COMSTAR D-2 satellite.

As set forth in greater detail in its Request, the Commission has previously concluded as a matter of record that the COMSTAR D-2 has "non-operational . . . status."<sup>3</sup> Further, on October 1, 1993, the COMSTAR D-2 was not authorized for the provision of "communications . . . on a common carrier/private

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<sup>1</sup> Omnibus Budget Reconciliation Act, Pub. L. No. 103-66, Title VI, §6003(g), 107 Stat. 397, approved August 10, 1993 (emphasis added).

<sup>2</sup> Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, Report and Order, MD Docket No. 94-19, released June 8, 1994 Appendix B at 35 (emphasis added).

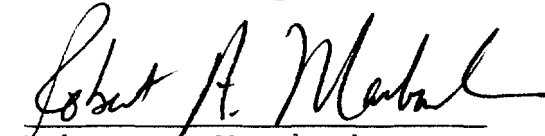
<sup>3</sup> COMSAT General Corp., 3 FCC Rcd 4216, 4218 (1988) (emphasis added).

carrier basis."<sup>4</sup> Accordingly, COMSAT General believes that for each of these reasons, no fee is due for the COMSTAR D-2.

Respectfully submitted,

COMSAT General Corporation

By:

  
Robert A. Mansbach  
Its Attorney

cc: H. Walker Feaster  
Thomas M. Holleran

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<sup>4</sup> See, COMSAT General Corp., 5 FCC Rcd 5622, 5623 n.5 (1990) (emphasis added).

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Implementation of Section 9 ) MD Docket No. 94-19  
of the Communications Act )  
 )  
Assessment and Collection of )  
Regulatory Fees for the 1994 )  
Fiscal Year )

To: The Managing Director

**REQUEST FOR REDUCTION OF FEE**

COMSAT General Corporation (COMSAT General), hereby requests the Commission to determine that the \$65,000 fee assessed by the Omnibus Budget Reconciliation Act of 1993 "per operational [domestic space] station in geosynchronous orbit"<sup>1</sup> authorized to provide communications between satellites and earth stations on a common carrier and/or private carrier basis",<sup>2</sup> on the October 1, 1993 date for calculating fees, is not required for its COMSTAR D-2 satellite. In the event the Commission is unable to make such a determination, COMSAT General respectfully requests the Commission to waive the \$65,000 fee for the D-2 satellite pursuant to Section 9(d) of the Communications Act of 1934, as

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<sup>1</sup> Omnibus Budget Reconciliation Act, Pub. L. No. 103-66, Title VI, §6003(g), 107 Stat. 397, approved August 10, 1993 (Budget Act) (emphasis added). The new Section 9 of the Communications Act is codified at 47 U.S.C. § 159.

<sup>2</sup> Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, Report and Order, MD Docket No. 94-19, released June 8, 1994 (Report and Order) Appendix B at 35 (emphasis added).

amended<sup>3</sup> or, alternatively, to reduce the \$65,000 fee proportionately to reflect the 77 day period between October 1, 1993 and December 16, 1993 when the D-2 was in the geosynchronous orbit during fiscal year 1994.

### Introduction

As set forth in greater detail below, the Commission has stated as a matter of record that the COMSTAR D-2 has "non-operational. . . status."<sup>4</sup> Further, on October 1, 1993, the COMSTAR D-2 was not authorized for the provision of "communications . . . on a common carrier/private carrier basis." Indeed, COMSAT General's last authorization to provide actual service to the public via the COMSTAR D-2 expired on October 4,

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<sup>3</sup> 47 U.S.C. § 9(d) (1994).

<sup>4</sup> COMSAT General Corp., 3 FCC Rcd 4216, 4218 (1988) (emphasis added). The D-2's non-operational status on October 1, 1993 is highlighted by its absence in the Commission's October 1, 1993 list of U.S. satellites consulted pursuant to Article XIV(d) of the INTELSAT Agreement and available for transborder use. See FCC Public Notice, Report No. 0338, October 1, 1993 at Attachment 1. In fact, in view of its inactive status, after April 1985, the FCC no longer listed the D-2 as a U.S. satellite consulted pursuant to Article XIV(d) of the INTELSAT Agreement. See, e.g., Western Union Tel. Co. et al., Order and Authorization, File Nos. I-T-C-83-136, 136A, released April 8, 1985; RCA American Communications, Inc., Order Authorization and Certificate, File No. I-T-C-86-002 et al., released February 14, 1986; GTE Spacenet Corp. et al., 2 FCC Rcd 2477 (1987); Home Box Office, Inc., 3 FCC Rcd 1235 (1990). The last time the Commission authorized an earth station to access D-2 for the provision of transborder services appears to have been in 1984. See, CNN, Inc., Order and Authorization in FCC File Nos. 2409-DSE-ML-84, 2410-DSE-ML-84, released December 17, 1984.

1990.<sup>5</sup> Accordingly, COMSAT General firmly believes that for each of these reasons, no fee is required for the COMSTAR D-2.

Nonetheless, out of an abundance of caution, and in view of the severe penalties which may imposed for non-payment of a fee, COMSAT General intends to submit a \$65,000 fee for the D-2 on or before August 19, 1994 as required by the Commission's Rules.<sup>6</sup> In support of its Request, COMSAT General submits the following information.

1. The COMSTAR D-2 was neither operational nor authorized to provide common/private carrier service on October 1, 1993.

The COMSTAR D-2, with a seven year design life, was authorized for operation in 1974, more than twenty years ago.<sup>7</sup> In its initial years, the D-2 performed ably, providing C-band space segment capacity to AT&T and GTE Satellite Corporation through 1981. After 1982, in light of serious operational difficulties and the absence of a customer base, the COMSTAR D-2 was co-located with the COMSTAR D-1 and later the COMSTAR D-3 to

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<sup>5</sup> See, COMSAT General Corp., 5 FCC Rcd 5622, 5623 n.5 (1990).

<sup>6</sup> Report and Order at paras. 33-35. We respectfully request the Commission to refund the \$65,000 upon grant of the action requested herein by COMSAT General, in accordance with Section 1165 of the Commission's Rules. 47 C.F.R. § 1165.

<sup>7</sup> Communications Satellite Corp., 42 F.C.C. 2d 677 (1973); Communications Satellite Corp., 45 F.C.C. 2d 444 (1974).

provide back-up capacity in the event of catastrophic failure.<sup>8</sup> In 1983, the COMSTAR D-2's license expired. In 1985, the Commission authorized COMSAT General to co-locate the COMSTAR D-2 with the COMSTAR D-4 "because neither was fully operational."<sup>9</sup> Neither satellite carried traffic between July 1985 and July 1988.<sup>10</sup>

In July 1988, COMSAT General's sought to re-license the D-2 for long-term composite operation with the D-4 to support its Safecomm business venture. However, the Commission denied COMSAT General's request, concluding that in view of its longstanding operational problems and lack of traffic, the COMSTAR D-2 had "non-operational . . . status."<sup>11</sup>

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<sup>8</sup> COMSAT General Corp., 84 F.C.C. 2d 547 (1981). The continued reliability of the D-2 became problematic in view of an abnormally high deterioration rate of the battery system.

<sup>9</sup> Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 3 FCC Rcd 6972, 6974 (1988). See also, COMSAT General Corp., 5 FCC Rcd at 5623 n.2. The COMSTAR D-2 and D-4 satellites were "colocated at 76° W.L. to operate as a 'composite' satellite". COMSAT General Corp., 3 FCC Rcd at 4217 (emphasis added). If the Commission determines that the D-2/D-4 constituted a single composite operational satellite on October 1, 1993, the Commission should require only one single \$65,000 fee for the composite D-2/D-4.

<sup>10</sup> See, COMSAT General Corp., 3 FCC Rcd at 4217 (reporting in July 1988 that the FCC's Field Operations Bureau "has found no radio frequency activity from [the D-2] since March 1986. . . .").

<sup>11</sup> COMSAT General Corp., 3 FCC Rcd at 4218 (emphasis added). The Commission referred to the D-2 as "a much older and more depleted facility" than the D-4, which was launched in 1981. Id.

In view of its "non-operational status," the Commission stated that it would continue to authorize the D-2's operation under Special Temporary Authority, but only if it could be "demonstrate[d] that the satellite can successfully maintain operations and provide actual service to the public."<sup>12</sup> COMSAT General briefly met this test, and seven of the D-2's twenty available transponders were then used on an intermittent basis to support Safecomm's customers between July 1988 and June 1990, pursuant to Special Temporary Authority.

However, the Safecomm venture failed and the D-2's final authorization to provide "actual service to the public" expired on October 4, 1990.<sup>13</sup> The D-2 reverted back to non-operational status and was not authorized to provide "actual service to the public", prior to being de-orbited on December 16, 1993.<sup>14</sup> Thus, very clearly, on October 1, 1993, the COMSTAR D-2 was not

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<sup>12</sup> Id. (emphasis added); accord, COMSAT General Corp., 5 FCC Rcd 5622 (1990).

<sup>13</sup> COMSAT General Corp., 5 FCC Rcd at 5623 n.5.

<sup>14</sup> Prior to de-orbiting the D-2, COMSAT General received a request from Andrews SciCom Inc. for permission to conduct certain scientific experiments via the D-2 over the brief period from October 22-November 19, 1993. These tests were designed to measure tracking accuracy capabilities on a highly inclined communications satellite, using no more than ten percent of one of the D-2's transponders and the equivalent of a ranging signal used for orbit-de-orbit determination. In the interests of scientific advancement, COMSAT General permitted Andrews to conduct the tests and, in turn, received \$4,000 from Andrews to recover the costs of COMSAT General's employees' time in working with Andrews on the test program. At the conclusion of the tests, the D-2 was de-orbited.

operational, nor was it authorized to provide either private or common carrier services to the public. For each of these reasons, no fee is due for the D-2.

## 2. The Legal Standard for a Waiver

Under the Commission's Rules, a waiver of the fees imposed by the Budget Act may be granted upon a showing of "good cause."<sup>15</sup> To qualify under that standard, an applicant must "plead with particularity the facts and circumstances which warrant such action" and demonstrate that strict adherence to the rule would not be in the public interest.<sup>16</sup>

Further a waiver must not undermine the underlying policy of the rule, and the party requesting a waiver must demonstrate the presence of "compelling circumstances" under which strict application of the rule would be inconsistent with the general purpose of the rule.<sup>17</sup> Regulatory fees "will be refunded . . . when a waiver is granted in accordance with Section 1165" of the Commission's Rules.<sup>18</sup>

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<sup>15</sup> 47 C.F.R. § 1165.

<sup>16</sup> WAIT Radio v. FCC, 418 F.2d 1153, 1157-1158 (D.C. Cir. 1969).

<sup>17</sup> Report and Order at para. 29.

<sup>18</sup> 47 C.F.R. § 1159(a)(3).



### 3. Reasons for Granting This Waiver

The Commission, industry,<sup>19</sup> and COMSAT General itself have long "acknowledge[d] that the COMSTAR D-2 . . . [is] non-operational."<sup>20</sup> Moreover, as we have shown, the D-2 was not authorized for common or private carrier services on October 1, 1993. As no fee is therefore owed for the D-2, we believe the Commission does not need to reach the issue of whether a waiver of the rules is required.

However, if the Commission finds that the fee schedule requires payment of a \$65,000 fee for the D-2, there is a clear

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<sup>19</sup> See, Comments of GTE Spacenet Corp. and Contel ASC, Inc. in FCC File No. 5543-DSS-AL-87(2). See also, Opposition of Hughes Galaxy, Inc. in FCC File Nos. 5-DSS-MP-92 and 6-DSS-MP/ML-92 (describing COMSTAR D-2 as "aging" and "obsolete").

<sup>20</sup> COMSAT General Corp., 3 FCC Rcd at 4217. We note that in its Report and Order, the Commission indicated that a satellite is considered to have terminated its operation when the licensee certifies to the Commission that the satellite has "ceased to operate." Report and Order at para 91. As the Commission's Rules apply prospectively, we believe this certification requirement applies to satellites ceasing operation after October 1, 1993 and not in those instances where the satellite's non-operation is already a matter of record before the Commission. However, and in any event, COMSAT General has certified to the Commission that the D-2 "would not be used for communications purposes." Letter from W. Coleman Guthrie, Vice President, COMSAT General Corporation to William J. Tricarico, Secretary, Federal Communications Commission, dated October 24, 1984. The Commission subsequently acknowledged COMSAT General's certification. See, letter from James R. Keegan, Chief Domestic Facilities Division, Common Carrier Bureau to Robert N. Axelrod, COMSAT General Corporation, dated November 6, 1984. See also, letters from Robert N. Axelrod to William J. Tricarico, Secretary, Federal Communications Commission, dated April 30, 1985 and February 25, 1986 ("COMSTAR D-2 . . . is not . . . being used for communications purposes.").

and compelling reason for granting a waiver: the plain language of the Budget Act makes clear that the Commission is permitted to recoup only expenses incurred in regulating operational satellites providing actual service to the public on the date for calculating fees.<sup>21</sup> We believe the Commission did not incur regulatory expenses for the non-operational COMSTAR D-2 during the fiscal year beginning on October 1, 1993. Absent regulatory costs, the \$65,000 "fee" acts as a penalty rather than a fee assessment. Thus, we submit that strict application of the fee schedule to the D-2, under the special circumstances set forth herein, would be inconsistent with the general purposes of the rule and the Budget Act, and contrary to the public interest.<sup>22</sup> A waiver of the rules is appropriate to mitigate the harsh and unintended consequences of applying the existing rule in these extenuating circumstances.

#### 4. Request for Pro-Rata Reduction in Fee

COMSAT General believes that if any fee is due at all for the D-2, fundamental principles of equity and fairness require

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<sup>21</sup> Budget Act, 47 U.S.C. § 159.

<sup>22</sup> COMSAT General believes that the Commission can grant such a waiver without undermining the general applicability of the rule. The D-2 presents a unique case and, as such, will not affect the Commission's underlying fee policies. Hence, if a waiver is granted for the D-2, the Commission will continue to be able to assess and collect fees from those satellites which were actually operational and/or authorized for private/common carrier service on October 1, 1993.

that fee be assessed on a pro rata basis, to reflect the brief 77 day period between October 1, 1993 and the December 16, 1993 during which the D-2 was located in the geosynchronous orbit.

COMSAT General has previously demonstrated at great length that "good cause" exists for not requiring any fee for the D-2. This demonstration applies with equal force with respect to COMSAT General's request to reduce the fee for the D-2 on a pro rata basis. Clearly, imposition of a \$65,000 fee on a non-operational/non-fully authorized satellite, de-orbited shortly after the date for calculating fees, does not properly reflect the allocation of costs of performing the Commission's regulatory fees in relation to the benefits provided by the activities.<sup>23</sup> Thus, if any fee at all is required for the D-2, it should be pro-rated to reasonably reflect the limited regulatory benefit involved.<sup>24</sup>

### **Conclusion**

COMSAT General has demonstrated with painstaking specificity that the D-2 was neither operational nor authorized to provide

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<sup>23</sup> See, House Conf. Rep. No. 103-213, 103rd Cong. 1st Sess. reported at 7A U.S. Code Cong. and Admin. News 1088 (1993).

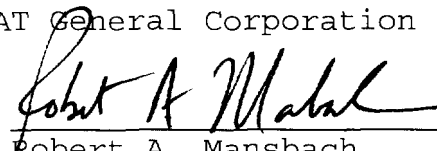
<sup>24</sup> The Commission's costs incurred in regulating a non-operational/non-fully authorized satellite must, in actuality, be quite limited. Accordingly, it is extremely unlikely that the Commission will suffer any adverse financial consequences by granting COMSAT General's Request.

"communications . . . on a common carrier and/or private carrier basis" on October 1, 1993. We have also provided specific facts and circumstances which demonstrate the hardship that would result from strict application of the Commission's rules in this case. These facts and circumstances satisfy the standard articulated in WAIT Radio and justify the grant of a waiver of the Commission's rules. In the event the Commission determines that any fee is due for the COMSTAR D-2, it should be pro-rated to reflect the very limited time the D-2 was located in the geosynchronous orbit after October 1, 1993 and the minimum, if any, expense of Commission regulation over that period of time.

Respectfully submitted,

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By:

  
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August 10, 1994

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